COLUMBIA LAW REVIEW.

Published monthly during the Academic Year by Columbia Law Students.

SUBSCRIPTION PRICE, $2.00 PER ANNUM. 30 CENTS PER NUMBER.

NOTES.

VIOLATION OF CHILD LABOR LAW AS EVIDENCE OF NEGLIGENCE.—The authorities, in determining the legal effect of an act done in violation of a statute or municipal ordinance, are in open conflict. The courts of at least fifteen States have taken the view that such an act constitutes negligence *per se* while the Federal and many other State courts hold that it is merely evidence of negligence to be given to the jury. The New York Court of Appeals adopt the latter rule in the recent case of *Marino* v. *Lehmaier* (1903) 173 N. Y. 530. The plaintiff, a child of 13 years, was employed by the defendant to work on a printing press. The Labor Law (sec. 70) provides: "A child under the age of fourteen years shall not be employed in any factory in this State" and makes such an act a misdemeanor. While working around the machine the plaintiff was injured. Having shown the breach of the statute and the injury a nonsuit was granted in the trial court. The Appellate Division reversed the decision on the ground that the violation of the statute warranted a finding of negligence. The Court of Appeals in an opinion by HAIGHT, J., ruled that the illegal act of the defendant was evidence of negligence for the jury, and in case it should be found that the defendant was negligent and the plaintiff under the circumstances not chargeable with contributory negligence the defendant should be held liable.

O'BRIEN, J., in a dissenting opinion, maintained that the breach of the statute was not only no proof of negligence *per se* (thus misunderstanding the view of the majority) but was no indication of negligence at all, citing *Brown* v. *The Buffalo R. R. Co.* (1860) 22 N. Y. 191, which decision was condemned by DAVIS, J., in *Jetter* v.

Harlem R. R. (1865) 2 Abb. Ct. of App. Dec. 458, and expressly overruled by *Massoth* v. *Delaware & Hudson R. R.* (1876) 64 N. Y. 524. There is to-day little if any authority for Judge O'BRIEN's position, all jurisdictions admitting that such an illegal act is either negligence *per se* or at least evidence of negligence. GRAY, J., dissented on the ground that the plaintiff had not shown that the injury was a direct result of the breach. The employment of a child of tender years about a complicated machine, does, however, tend to result in injury to him, and in this respect the case is unlike *White* v. *Lang* (1880) 128 Mass. 598, where it was held that the act of travelling on Sunday "had no tendency to produce the assault or the consequent injury; and therefore though the plaintiff was travelling in violation of law, it does not defeat his right of recovery."

In the principal case the court made no distinction between the statute in question and the great mass of statutes and ordinances and applied the rule which of late years has been quite uniformly applied in New York. In the early case of *Jetter* v. *Harlem R. R.* (*supra*) the court said: "Every person while violating an express statute is a wrongdoer and as such is *ex necessitate* negligent in the eye of the law, and every innocent party who is injured by the act may recover notwithstanding any redress the public may have." This decision formed the basis for many similar holdings in other States, but in New York the doctrine was limited by *Knupfle* v. *Ice Co.* (1881) 84 N. Y. 488, holding that the illegal act was merely evidence of negligence. This last case was severely criticized in *Bott* v. *Pratt* (1885) 33 Minn. 323 but cited and reaffirmed in *Moore* v. *Gadsden* (1883) 93 N. Y. 12. Since then that doctrine has been applied in New York except in the cases of *Donnegan* v. *Erhardt* (1890) 119 N. Y. 472 and *Pitcher* v. *Lennon* (1896) 12 App. Div. 356. These decisions resting on the doctrine of *Jetter* v. *Harlem R. R.* (*supra*) held that the violation of a statute which as in the principal case had a penal sanction was negligence *per se*.

It would seem that the true rule, broadly speaking, should be that whenever it is clear from a purview of the statute that the exact consequences against which it was intended to provide have actually ensued from its violation the act is negligence *per se*; but if the injury is merely collateral the breach is evidence of negligence, *Hayes* v. *Michigan Central R. R.* (1883) 111 U. S. 228. Thus the conflict which should be but apparent has become real due to following precedent without distinguishing the facts. Applying this rule to the principal case it would seem that the court in basing the defendant's liability on the question of negligence should have found negligence *per se*.

But does not the policy behind this statute warrant a more rigid application? This is not a statute creating a new right and imposing a duty not before existing and therefore to be limited to the penalty imposed. Nor is it a statute passed for the protection of persons deemed capable of exercising due care so that the plaintiff to recover must show freedom from contributory negligence. The above noted incidents are common to the great mass of statutes and ordinances but do not apply to this statute. Admitting then, that as a general rule the breach of a statute or municipal ordinance may be negligence

per se or evidence of negligence, it seems that here is a statute whose policy is to establish an absolute prohibition of such a nature that any person violating it does so at his peril. Thompson on Negligence, Vol. I, § 13.

Prior to the passing of the Labor Law it was always a question for the jury whether the child was of sufficient age to appreciate the dangers to which it was subjected. If the jury found in the negative then the liability of the employer became absolute. In the case of *Hickey* v. *Taaffe* (1887) 105 N. Y. 36 PECKHAM, J., said: "If a person is so young that even after full instruction he wholly fails to understand them and does not appreciate the dangers arising from a want of care, then he is too young for such employment and the employer puts or keeps him at such work at his own risk." Many cases might be cited holding that in absence of statute when the jury found that the plaintiff was too young to understand the nature and risk of the particular employment the question of the negligence of either party becomes immaterial and the defendant liable as a matter of law for resulting injuries. The purpose of this statute as defined by HAIGHT, J., was for the protection of young children whose health and lives had been gravely menaced by the increase of new mechanical appliances, many of which were so easily operated that the practice of employing child labor had become extensive. The policy of the statute it seems fair to infer, was to fix the age limit below which it was neither safe nor proper to employ a child. It takes from the jury the question of fact and declares the minimum of care which an employer could use, *viz* , that a child under the age of fourteen is not capable of exercising due care around machinery and any such employment is a dangerous and wrongful act.

The court evidently inclined toward this view in holding that the defendant would be liable for all the direct consequences. When applying the doctrine of negligence the defendant should be liable only for the natural and probable consequences. *Stone* v. *B. & A. R. R.* (1897) 171 Mass. 544. The injury in the principal case was hardly a natural or probable consequence since the machine was still when the plaintiff was working around it and the cause of its starting was unexplained. It is to be regretted, however, that the court allowed the question of contributory negligence to go to the jury. While it may be objected that the statute, if it was intended to make the employer liable for all the direct consequences, should have been so expressed instead of making the offense a misdemeanor, nevertheless, considering the attitude of the courts prior to the statute, and the motives for its enactment, it seems a reasonable inference that its policy was to render a defendant who employed a child under fourteen years of age absolutely liable for the direct consequences of such employment and to make the question of the defendant's negligence or of the child's contributory negligence immaterial. When the statute by its clear intendment says that a child under the age of fourteen is incapable of exercising due care and must not be employed, shall a violator of that law excuse himself from liability for an injury to the child on the ground of his or her contributory negligence? It would seem more in accord with the policy of the statute to hold that by a violation of such a duty the wrongdoer assumes the risk.